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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 23

BADGER MUTUAL INSURANCE COMPANY and NORTHWESTERN MUTUAL FIRE ASSOCIATION,
Petitioners,

vs.

SAM SERIO, d b a MAGNOLIA CANNING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. .....

BADGER MUTUAL INSURANCE COMPANY and NORTHWESTERN MUTUAL FIRE ASSOCIATION,
Petitioners,

vs.

SAM SERIO, d/b/a MAGNOLIA CANNING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners, Badger Mutual Insurance Company and Northwestern Mutual Fire Association, pray that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the judgment of that Court in the above entitled cause vacating the judgment of the District Court of the United States for the Southern District of Mississippi, Jackson Division.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit dated May 5, 1959, has now been reported in 266 F.2d 418. A copy thereof is attached as Appendix "A". No opinion was rendered by the Court of Appeals for the Fifth Circuit on entering judgment denying Petition for Rehearing.

An oral opinion was rendered by the Judge of the District Court of the United States for the Southern District of Mississippi, Jackson Division, directing the jury to enter a verdict for the petitioners here. The opinion was not reported, but is incorporated in the certified transcript of the record being filed herewith (R. 565), and a copy is attached to this Petition as Appendix "B".

A letter opinion of the Judge of the District Court of the United States for the Southern District of Mississippi, Jackson Division, overruling Respondent's Alternate Motion for a Judgment Notwithstanding the Verdict or for a New Trial was rendered, and was not reported. However, the same is incorporated in the certified transcript of the record being filed herewith (R. 583) and a copy is attached to this Petition as Appendix "C".

A letter opinion by the Judge of the District Court of the United States for the Southern District of Mississippi, Jackson Division, overruling the Motion of Respondent here to reopen the case under Rule 60(b)(2) was rendered and was not reported. However, the same is incorporated in the certified transcript of the record being filed herewith (R. 632) and a copy is attached to this Petition as Appendix "D".

JURISDICTION.

The judgment of the Court of Appeals of the Fifth Circuit, vacating judgments of the District Court of the United States for the Southern District of Mississippi, Jackson Division, was entered on May 5, 1959 (R. 649). A copy of said judgment is attached hereto as Appendix "E".

The judgment of the United States Court of Appeals for the Fifth Circuit denying a Petition for Rehearing was entered on June 4, 1959 (R. 684). A copy thereof is attached hereto as Appendix "F". The mandate was stayed on June 17, 1959, and the order thereon is included in the certified transcript of the record filed herewith (R. 689).

The jurisdiction of this Court is invoked under New Title 28, United States Code, Sec. 1254(1).

QUESTIONS PRESENTED

The District Court granted Petitioners, insurers of the contents of a canning factory, a peremptory instruction on the ground that insured had breached the Iron Safe Clauses in the policies by failing to produce his Records, which insured alleged had been destroyed by the fire. Approximately two and one-half years after the fire and four months after judgment was entered for Petitioners, Respondent filed a motion for relief under Rule 60(b)(2) alleging that the Records had been found and constituted newly discovered evidence.

There is here involved the error of the Court of Appeals below in vacating the denial by the District Judge of this Motion for a New Trial under Rule 60(b)(2). Questions presented are:

Can A Court of Appeals —

1. vacate a finding by the trial judge that proper diligence was not used, such finding being supported by adequate facts and circumstances, and determine the issue of due diligence *de novo* and merely substitute its own conclusion or opinion for that of the trial judge;

2. vacate the exercise of discretion of the trial judge in denying such relief when there has been no "abuse of discretion";

3. vacate a District Judge's denial of relief under Rule 60(b)(2), where in the exercise of his discretion the trial judge had found that the newly discovered evidence would not produce a different result on a new trial because there was a breach of the Iron Safe Clauses even though the Records were not destroyed by fire;

4. vacate a denial of relief under Rule 60(b)(2), particularly in a Diversity of Citizenship case, where under the substantive law of the applicable state, which can be ascertained by a Court of Appeals without difficulty, the newly discovered evidence would produce the same result, although on a different ground, on a new trial;

5. itself grant relief under Rule 60(b)(2), on the ground of accomplishing justice, where the evidence was not available at the time of the trial because of the negligence of Movant and Movant did not use due diligence in discovering the new evidence; where Movant was under no disability, had a fair trial represented by counsel, and where neither opposing litigants nor the Court were at fault; where there was finding of the trial judge, in the exercise of his discretion, that there had been no injustice and where the applicable state law is to the effect that apparent hardship cannot justify a court in not enforcing a solemn, contractual agreement.

STATUTES INVOLVED.

New Title 28, United States Code, Sec. 2072:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the District Courts of the United States and of the District Court for the Territory of Alaska in civil actions * * *

"* * *

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

Rule 60(b):

"Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) *newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);* (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the

finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and *the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.*"

STATEMENT OF CASE.

Petitioners were insurers of the contents of the Magnolia Canning Company operated by respondent Serio. A fire occurred on September 24, 1955.

On November 30, 1955, Petitioners filed a complaint seeking a declaratory judgment in the District Court of the United States for the Southern District of Mississippi, Jackson Division, asking the Court to declare that they were not indebted to the Respondent in any amount under the policies of insurance as a result of the fire loss of September 24, 1955.

The basis for federal jurisdiction in the court of first instance was that said court had original jurisdiction of this civil action, the matter in controversy exceeding the sum or value of $3,000.00 exclusive of interest and costs, between citizens of different states pursuant to New Title 28, United States Code, Sec. 1332, and pursuant to New Title 28, United States Code, Sec. 2201, creating the remedy of declaratory judgments.

The complaint of Petitioners for a declaratory judgment (R. 2) denied any liability for the loss on three

grounds: (1) that Respondent had violated the Iron Safe Clause in the policy and had failed to produce the required records and inventories for the inspection of the company, such failure making the policies null and void and constituting a perpetual bar to any recovery thereon; (2) Respondent had made false statements under oath during the Examination Under Oath taken pursuant to the policy agreement therefor; (3) the policy was void at the time of the fire because the hazard was at that time increased by means within the control and knowledge of the insured in that the premises were being used in connection with illegal shipments of liquor into the State of Mississippi and an inflammable substance believed to be diesel oil was present in the building during the fire.

Respondent filed an Answer and a Cross-Claim seeking recovery of the full face of the policies or $60,000.00.

The case was tried before a jury and at the conclusion of the testimony the District Judge granted Petitioners a peremptory instruction on the ground that Respondent had breached the Iron Safe Clause in the policies (see Appendix "B" hereto) and a judgment was entered on September 13, 1957, adjudging that Petitioners were not indebted in any amount to Respondent (R. 574). An Alternative Motion for a Judgment Notwithstanding the Verdict or for a New Trial was filed by Respondent and an Order overruling the same was entered (Letter opinion of District Judge is Appendix "C" hereto).

Pertinent facts as reflected by the record include:

1954

Dec. 30 Physical inventory taken (but not produced).

1955	
Jun. 30	Physical inventory taken.
Sep. 13	Miss Lederer, bookkeeper for Respondent, left town, leaving the Books of Account and Records on top of a cabinet in the office.
Sep. 15	Serio indicted on a liquor charge in Louisiana.
Sep. 16	Notice of cancellation mailed Serio by both Petitioners, to be effective September 26, 1955, cancellation notices being sent on account of the liquor indictment.
Sep. 17-23	Serio contacted agent for Petitioners several times about reinstatement, which was refused. He contacted an agent for another company in an effort to get insurance but was unsuccessful.
Sep. 24	Plant of Magnolia Canning Company burned that night.
Nov. 3	Serio submitted to Examination Under Oath, on the demand of the insurers as provided for in the policy, and on demand for inspection of all books and records testified that they had been destroyed by the fire except for an inventory of June 30, 1955, a folder containing a few loose invoices and a yellow sheet of paper with pencil figures thereon, marked "rough" alleged to be a trial balance as of June 30, 1955, which were submitted to insurers; that he had made a "careful search" for any other Records.
Nov. 30	Complaint filed herein by Petitioners.
1956	
Jan. 23	Respondents filed an Answer alleging affirmatively that all other books and records were destroyed by fire, together with a Cross-Bill.
Jun. 1	Deposition of Miss Lederer taken under Federal Rules. She testified that the day before she left town on a trip she left all of the other books of account and original records, includ-

ing all bank statements, returned checks, etc., on top of a file in the office in the plant and that they were destroyed by fire.

1957

Sep. 11 Trial of this case was begun in the District Court of the United States for the Southern District of Mississippi, Jackson Division.

During the trial no additional books or records were produced or tendered. Both Serio and Miss Lederer again testified that the original records and books of account, all bank statements, returned checks, etc., were destroyed in the fire. The position that the few records theretofore submitted constituted a compliance with the Iron Safe Clause was urged. However, an expert actuary, witness for Respondent, admitted that the amount of the loss could not be established except by and through oral evidence (R. 544). The claim of Respondent as to the amount and value of contents lost clearly illustrated the reasons for and the necessity for the requirement of production of previous inventories and permanent books of account to substantiate quantities and value of contents in order to protect the insurers against fraud.* Moreover, a jury issue was made as to increase of hazard by means within the knowledge and control of the insured and the presence of inflammable substances in the building during the fire.

As stated, at the conclusion of the trial the District Judge directed a verdict for the Petitioners here because of the failure of Respondent to comply with the Iron Safe Clause in the policies. Events thereafter were as follows:

*For example: out of $60,000 loss claimed Respondent was claiming loss of a future 23 year supply of paper labels for cans, valued at $13,022.62 and a future 10 year supply of cardboard cartons valued at $22,605.39; such labels and cartons being readily subject to total consumption by fire leaving no identifiable salvage.

1957	
Sep. 13	Judgment entered for Petitioners here.
Sep. 21	Alternate Motion for Judgment N.O.V. and new trial filed by Respondent.
1958	
Feb. 21	Alternate Motion for Judgment N.O.V. or New Trial overruled by District Judge.
Mar. 11	Notice of Appeal and Bond, etc.
Apr. 2	Two years and five months after the fire and over 6 months after Judgment Respondent filed Motion for Relief from Judgment on the basis that certain Books of Account and Records had been found and constituted newly discovered evidence.
Jun. 11	Motion for Relief from Judgment overruled by the District Judge on the grounds: (a) the alleged newly discovered evidence could by due diligence have been discovered in time for a new trial under Rule 59(b) and movant had been negligent in failing to find such records and therefore movant was not entitled to any relief under Rule 60(b)(2). (b) The records were negligently lost and the failure to produce the same for two and one-half years after the fire constituted a breach of the contractual provisions of the policies and therefore the allegedly newly discovered evidence would not alter the results of the case after remand and new trial.
Jun. 14	Second appeal perfected to the Court of Appeals of the Fifth Circuit.
1959	
May 5	Judgment of the District Court vacated by Court of Appeals of Fifth Circuit.

Respondent in his Motion for Relief From Final Judgment filed on April 2, 1958, alleged that certain of his books

and records "have been found and discovered and constitute and are newly discovered evidence within the meaning of Rule 60(b)(2)." (R. 604). These records allegedly consisted of a general ledger, a typewritten *copy* of an inventory of December 31, 1954, a cash journal, check stubs, and bank statements (R. 609). The books themselves were not submitted to the Court or to opposing counsel and are identified by the accountant for the movant in an unsworn letter to the effect that such records were in his possession but that he had not yet examined the same and could not determine whether or not they were original records.

The motion and affidavits attached thereto, upon which movant based his right to set aside the judgment, reflect the following facts:

1. These books and records were lost due to the negligence of Respondent and his employees.

On or about September 12, 1955, Miss Lederer, movant's bookkeeper, negligently left the bulky Books and Records out of the safe and on top of a cabinet in the office. Between September 12th and September 24th Respondent, although in and out of the plant and the office did not notice these books of account on top of the cabinet. A few days before the fire Respondent instructed an employee Varnado who could neither read nor write to go to the office and clean up and move "old hard back books, ledgers, etc." from the office into a storage room, which was back of the boiler room. Varnado was not supervised during this operation. The original books and records now allegedly found were moved by Varnado into the storage room.

2. These books and records were not found in two and one-half years after the fire but at all times were in the possession of Respondent and could have been found with due diligence.

The storage room was not burned during the fire. Although Respondent had testified under oath that he had after the fire made a careful search for the records, no allegations were made as to why he did not question Varnado about the records moved by him or check to determine what he had moved; and no explanation was offered as to why he had never been in this storage room from the date of the fire in September, 1955, until March 14, 1958. The allegations were that they merely "assumed" that the Records were destroyed by fire. The books and records were readily discovered when he went into the storage room on March 14, 1958.

Petitioners here filed a Motion to Strike Respondent's Motion, (R. 630) and an affidavit in opposition thereto (R. 619), which contained in part the following language:

> "If Serio had furnished his complete records within a reasonable time after the fire, the companies would have had an opportunity to check those records with the people with whom Serio claimed to have done business at a time when the transactions were reasonably fresh in the minds of all concerned. To tender such records two and one-half years after the fire destroys the ability of the insurance companies to make that type of check of the records to which they were entitled, and the contract between the parties agreed that the failure of Serio to 'produce' the records 'shall constitute a perpetual bar' to any recovery thereon."

No additional affidavits were filed by Respondent. The Motion was heard by the District Judge without a

jury on the affidavits, and he made the following finding of fact:

> "Assuming, for the purpose of this opinion, that the documents now tendered are original records, in my judgment their production at this late date would not be sufficient to avoid forfeiture of the policy. It was the duty of Serio to present these records within a reasonable time, which he failed to do. His excuse for the failure is not sufficient in law to comply with the terms of the policy. The documents were in the possession of Serio and his failure to produce them within a reasonable time was his own fault. It was his employee who misplaced the records and the negligence of this agent of his would be imputable to Serio. He failed to show due diligence in finding them. Under his own affidavit it should have occurred to him immediately, as a reasonably prudent person, that this employee of his had misplaced them and he should have searched the place at that time where he subsequently located them. I am therefore of the opinion that the showing for newly discovered evidence is insufficient." (See Appendix "D").

This finding of fact and the judgment of the District Judge overruling the Motion for Relief under Rule 60(b) was vacated by the Court of Appeals below.

REASONS FOR GRANTING THE WRIT.

This Petition for Writ of Certiorari to review the judgment from the Court of Appeals of the Fifth Circuit is based upon the following grounds:

1.

The Court of Appeals below has rendered a decision in conflict with decisions of all other Courts of Appeals and of this Court in holding that on review of a denial of a motion under Rule 60(b)(2) the Court of Appeals cannot reverse the findings of fact of lack of due diligence of the District Judge and vacate the exercise of discretion by the District Judge in denying relief because there was no due diligence on the part of the movant unless the finding of the District Judge to that effect was a manifest abuse of his discretion.

Respondent by his motion tendered his newly-found Records as newly discovered evidence under Rule 60(b)(2). This rule which grants the sole right to such relief limits it to newly discovered evidence "which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)."

The District Judge found as a fact that there had not been due diligence on the part of respondent in finding his lost Records. The decision based thereon denying relief constituted an exercise of discretion by the trial judge.

Such a decision is reviewable by a Court of Appeals only indirectly where there is a manifest abuse of that discretion. Every Court of Appeals and this Court has so held.*

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*See for example *Hobart* v. *O'Brien*, C.A. 1, 243 F.2d 735, cer. den. 2 L. Ed. 2d 43, 355 U.S. 830; *Helene Curtis Industries* v. *Sales Affiliates*, C.A. 2, 233 F.2d 148, cer. den. 1 L. Ed. 2d 80, 352 U.S. 879; *Cathedral Estates* v. *Taft Realty Corp.*, C.A. 2, 228 F.2d 8; *Hill* v. *Pennsylvania Greyhound Lines*, C.A. 3, 174 F.2d 171; *Aetna Casualty & Surety Co.* v. *Yeatts*, C.A. 4, 122 F.2d 350 *Turner* v. *U. S.*, C.A. 6, 229 F.2d 944; *Miller* v. *N. Y. Central R. R. Co.*, C.A. 7, 239 F.2d 10; *Kansas City Stockyards Co. of*

And yet the Court of Appeals below has vacated such exercise of discretion by the District Judge without holding that there was a manifest abuse of discretion and under circumstances where there could not be a holding of manifest abuse of discretion in determining that there was a lack of due diligence on the part of movant.

There was substantial evidence, submitted by Respondent in his own affidavits on his motion, of lack of due diligence. Respondent was under an affirmative contractual duty to so care for his Records that he could produce them after a fire. The Records were originally lost due to the negligence of Serio and his employees, for which negligence he was responsible. Serio was negligent after the fire in making no search for such Records even in an obvious place, *i. e.*, the unburned storage room where Varnado had moved some records and where a fireman might have moved other records. He made no inquiry of or check on Varnado as to what he had moved. Serio was charged with constructive knowledge or notice of or put upon inquiry as to what Varnado had moved. *Greenspahn* v. *Seagram*, C.A. 2, 186 F.2d 616; *Harris* v. *Gulf Refining Co.*, C.A. 5, 240 F.2d 249; *Smith* v. *Pacific Mutual Life Ins. Co.*, C.A. 6, 192 F.2d 248; *Booth Fisheries Corp.* v. *Coe*, C.A. D.C., 114 F.2d 462, cer. den. 85 L. Ed. 447, 311 U.S. 690-692.

Instead of making any search or inquiry Respondent merely says that he "assumed" that the records were destroyed by fire. Such a mere assumption by Respondent is no excuse. A litigant who relies on an assumption when under an affirmative duty to exercise due diligence

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Maine v. *Anderson*, C.A. 8, 199 F.2d 91; *Norwich Union Fire Ins.* v. *Glassers* C.A. 9, 224 F.2d 385; *Atchison, Topeka & Santa Fe R. R. Co.* v. *Jackson*, C.A. 10, 235 F.2d 390; *Washington Times Co.* v. *Bonner*, C.A. D.C. 86 F.2d 836.

does so at his peril. *Ives* v. *Sargent*, 119 U.S. 652, 30 L. Ed. 544; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 67 L. Ed. 719; *Greenspahn* v. *Seagram*, C.A. 2, 186 F.2d 616, where the court pointed out "Negligent ignorance frequently has the same effect in law as actual knowledge."

There being evidence to support the District Judge in exercising his discretion in denying the Motion there was no "abuse of discretion". Before there is an abuse of discretion the decision of the trial judge must not rest on any facts or circumstances nor be supported by any deductions or conclusions therefrom. There is no abuse of discretion merely because the appellate court would have arrived at a different conclusion from the facts and circumstances or might be inclined to take a different view of the matter or has a different opinion with reference thereto.* Here the Court of Appeals below merely substituted its own opinion or conclusion for that of the District Judge. This, a Court of Appeals cannot do. See *U. S.* v. *Johnson*, C.A. 7, 142 F.2d 588; 149 F.2d 31; 327 U.S. 106, 90 L. Ed. 562, where this Court held that a Court of Appeals in reviewing a denial of a Motion for a New Trial could not substitute its judgment on the facts for that of the trial judge and approved the language of the dissenting opinion in the Court of Appeals reported 149 F.2d 31 to the effect that:

> "We (the Court of Appeals) determine only whether the trial court reached a decision it might reasonably have reached upon the facts before it; not whether we, on these facts, might have reached a different conclusion."

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* *Slobaden* v. *True Oil*, Cal., 281 P.2d 85; *Van Ostrum* v. *State*, Cal., 306 P.2d 44; *Stockhausen* v. *Oehler*, Wis., 211 N.W. 287; *Hamilton* v. *U. S.*, 31 A.2d 887; *Dolen* v. *State*, Neb., 27 N.W.2d 264

This Court, in affirming the action of the Court of Appeals on the first appeal, as reported in 142 F.2d 588, where the Court of Appeals affirmed the District Judge in denying a Motion for a New Trial, and in criticizing and reversing the action of the Court of Appeals on the second appeal, as reported in 149 F.2d 31, where the Court of Appeals reversed the trial court in denying a motion for a new trial, and in upholding the District Judge in denying the motions for a new trial, used the following language:

> "The Circuit Court of Appeals affirmed. 142 F.2d 588. *It unanimously held that it could not substitute its judgment on the facts for that of the trial judge;* that it did not have power to try these facts de novo; that it could review the record for errors of law, to determine, among other things, whether the trial judge had abused his discretion; that a review of the new evidence in the record did not *inevitably* lead to the conclusion that Goldstein had testified falsely; that the trial judge had not reached his conclusion 'arbitrarily, capriciously, or in the misapplication of any rule of law' *and hence had not abused his discretion.*
> * * *
>
> *"The Circuit Court of Appeals was right in the first instance, when it declared that it did not sit to try de novo motions for a new trial.* It was wrong in the second instance when it did review the facts de novo and order the judgment set aside."

Here the facts do not "inevitably lead" to the conclusion that the Records could not have been discovered in the two years between the fire and the trial by due diligence. The court below does not purport to so state but admittedly merely draws a different conclusion from the

facts and circumstances presented by the record and merely substitutes its judgment for that of the trial judge.

Presumably, the Court of Appeals below realized this and sought to bolster its opinion by again announcing the doctrine (in face of the fact that Rule 60(b)(2) which grants the right of a new trial specifically limits it to cases where due diligence has been exercised), that where the ends of justice require it a new trial may be granted on newly discovered evidence even though proper diligence was not used to secure such evidence. We so state because the Court cited its prior opinion of *Ferrell* v. *Trailmobile, Inc.*, C.A. 5, 223 F.2d 697.*

This holding is in conflict with decisions of this Court and of other Courts of Appeals. In *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 67 L. Ed. 718, this Court held that: "* * * *The indispensable condition* of their (motions for new trials, etc.) being granted was that the failure to discover the evidence in time for the trial was not due to a lack of diligence on the part of the applicant."

Other Courts of Appeals making due diligence an absolute requirement as a condition precedent to relief by motion for a new trial on ground of newly discovered evidence include: C.A. 6—*Grant County Deposit Bank* v. *Greene*, 200 F.2d 835; C.A. 9— *U.S.* v. *Bransen*, 142 F.2d 232; C.A. 10—*Kansas City Southern Railway Co.* v. *Cagle*, 229 F.2d 12, cer. den. 351 U.S. 908, 100 L. Ed. 1443; together with numerous other cases. The court below in *Ferrell* v. *Trailmobile, Inc.*, *supra*, cited no other federal decisions but

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*The opinion in this case, however, not only limits such a rule as applicable only to prevent manifest miscarriage of justice but also limits it to a case where the "practically conclusive evidence" shows that the movant would be successful on the new trial, inapplicable here as will be discussed under Point II.

relied merely on a few state cases which can be readily distinguished.*1

The Court of Appeals below now apparently seeks to bolster such a rule by citation of the case of *Klapprott* v. *U. S.*, 335 U.S. 601, 93 L. Ed. 266. This case, however, did not involve a motion for a new trial under Rule 60(b)(2), on the ground of newly discovered evidence but a motion to set aside a default judgment,*2 and the granting of the relief was expressly under Rule 60(b)(6), which this Court held to be applicable only when the other five reasons were inapplicable, using the following language:

> "In simple English, the language of the 'other reason' clause, *for all reasons except the five particularly specified*, vest power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

Moreover, there was no such manifest miscarriage of justice here as there was in the Klapprott case. Such relief was there justified because of the following unusual conditions: (1) The judgment was a default one and a citizen was stripped of his citizenship by his government without evidence or hearing or benefit of counsel; (2) At the time of the default judgment the defendant was in jail, weakened from illness, without an attorney or any funds with which to obtain an attorney; (3) At the time of the

*1. The Mississippi rule has always been that due diligence is an indispensable condition precedent to the granting of a new trial on the ground of newly discovered evidence. *Hutto* v. *Kremer*, Miss., 76 So.2d 204; *Roberts* v. *International Harvester*, Miss., 179 So. 745, 180 So. 747; *Redmond* v. *Marshal*, Miss., 137 So. 733.

*2. Relief from default judgments always being more liberally allowed. *Bridoux* v. *Eastern Airlines*, C.A. D.C., 214 F.2d 207.

judgment defendant was under such disability because of the action of the United States Government, the plaintiff in the suit in which the default judgment was taken, and his inability to defend was therefore the fault of the United States Government, this Court pointing out: "It is clear therefore that for four and a half years this petitioner was held in prison *on charges that the Government was unable to sustain.*" Under these unusual circumstances the Court permitted relief from the judgment but permitted the same only under Rule 60(b)(6).

None of these elements of unjustice are present here. Appellant was not "deprived" by anyone else of any right he had to attempt to prove that he had sustained a loss within the terms of the policies. He could certainly blame no one but himself and his own employees for the fact that the records were lost at the time of the trial. He had his day in court and had a full and fair trial, represented by able counsel. He was not rushed into trial but two years intervened between the fire and the trial. There is no suggestion of any unfair, wrongful or inequitable conduct on the part of petitioners here. There is no suggestion of any wrongful conduct on the part of the trial judge. At the time of the trial he was under no incapacity or disability. His only excuse is the carelessness of his employees, negligence on his part and reliance on statements of others and a false assumption. There are no equities in Respondent's favor.

2.

The Court of Appeals below has rendered a decision in conflict with decisions of all other Courts of Appeal if holding that relief can be granted a Movant under Rule 60(b)(2) where the Movant has not proved that the newly discovered evidence would produce different results on a new trial.

A decision here that the newly discovered evidence would produce different results on a new trial would be in conflict with the decisions of the Supreme Court of Mississippi and of this Court in that there was a breach of the Iron Safe Clauses even though the Records were not destroyed by fire.

The District Judge below specifically found, in exercising his discretion to deny relief under Rule 60(b)(2), that Respondent not only was not entitled to relief because he had failed to use due diligence in producing his records at the trial *but also* that he had violated his contractual agreement to produce his records and books of account for inspection by the insurers within a reasonable time after the fire and that such failure prevented any recovery on the policies; that therefore because of this breach of a contractual provision the Respondent could not obtain a different result on the new trial.*

The District Judge heard the motion under Rule 43(e) on affidavits, taking into consideration all previous testimony and exhibits (*McLanahan* v. *Universal*, 1 Peters 170,

*The District Judge found: "In my judgment their (the books) production at this late date would not be sufficient to avoid forfeiture of the policy. It was the duty of Serio to present these records within a reasonable time, which he failed to do. His excuse for the failure is not sufficient in law to comply with the terms of the policy." Appendix "D"

7 L. Ed. 98), and his decision as to whether the newly discovered evidence would probably produce a different result on a new trial must stand in the absence of a clear showing of abuse of discretion. *Chambers* v. *Anderson*, C.A. 6, 58 F.2d 151; *Royal Insurance Co.* v. *Eastham*, C.A. 5, 71 F.2d 385; *Barrington* v. *Swanson*, C.A. 10, 249 F.2d 640; *Phillips* v. *Employers Mutual Liability Ins. Co.*, C.A. 5, 239 F.2d 79; *Pekin Warehouse Co.* v. *Parnell Co.*, C.A. 8, 242 F.2d 166; *Fisher Studio* v. *Loew's, Inc.*, C.A. 2, 232 F.2d 199, cer. den. 1 L. Ed. 2d 55, 352 U.S. 836.

The Court of Appeals below did not specifically hold that the offer to produce certain alleged original books and records two and one-half years *after the fire* would produce a different result on a new trial.*[1] Unless it did and could so find then granting relief under Rule 60(b)(2) was in direct conflict with decisions of every other Court of Appeals and with former decisions of that Court itself. *Union Bleachery* v. *U. S.*, C.A. 4, 176 F.2d 517, cer. den. 339 U.S. 964, 94 L. Ed. 1373; *Ramsey* v. *Curtis*, C.A.D.C., 182 F.2d 687; *Harris* v. *Whiteman*, C.A. 5, 243 F.2d 536; *Royal Insurance Co.* v. *Eastham*, C.A. 5, 71 F.2d 385, cer. den. 79 L. Ed. 658; *Davis* v. *Yellow Cab Co. of St. Petersburg*, C.A. 5, 220 F.2d 790; *Johnson* v. *Masonic Benefit Co.*, C.A. 5, 138 F.2d 817; *Chemical Delinting Co.* v. *Jackson*, C.A. 5, 193 F.2d 123.*[2]

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*And yet on a new trial when this defense is raised, can it be said that the trial judge is free to decide this question on the rule of substantive law in force in Mississippi to the effect that such offer is too late to constitute a compliance with Respondent's contract of insurance?

*2. A very different situation was presented in *Ferrell* v. *Trailmobile, Inc.*, C.A. 5, 223 F.2d 697, cited by the court below where that Court held, and correctly held, that the newly discovered evidence was "practically conclusive" of the right of Movant to final judgment.

The Mississippi rule is reflected in *Haber v. Lane*, 45 Miss. 608, where the Court used the following language:

> "We cannot say, if the matter of defense set up in the affidavit had been put in evidence before the jury, it would *conclusively follow that the plaintiffs should not recover.* * * * *A full and complete defense must be set up so* * * * *that, upon another trial, a different result would be reached.*"

The Court of Appeals below was in error if it reasoned that because the judgment against Respondent in the District Court was based on the destruction of his records by fire that when such records were now found a different result would be obtained on a new trial in the court below. On a new trial the same result would be reached although on a different ground *i. e.* on a failure to produce the records for the inspection of the insurer and to enable it to investigate the loss within a reasonable time after the fire, rather than upon the failure to preserve the records from being destroyed by fire.

The standard Iron Safe Clauses here involved not only require an insured to keep adequate books and records, which without the aid of oral evidence present a complete record of business transacted, and to make annual inventories and to preserve the last two preceding inventories and the books of accounts so that they would not be destroyed by fire; but also provide:

> "In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

Under such contractual provisions such records must be produced in a reasonable time after the fire, when called

for. *Stovall* v. *Sterling Fire*, La., 111 So. 707; *Continental Insurance Co.* v. *Rosenberg*, 74 Atl. 1073; *Appleton on Insurance*, Sec. 3026; *Couch on Insurance*, Sec. 1036.

That petitioners here were prejudiced by the failure to produce the records when called for in a reasonable time after the fire stands undisputed here. The affidavit of Petitioners in opposition to a Motion for a New Trial was to the effect that if Serio had furnished his complete records within a reasonable time after the fire the companies would have had an opportunity to check those records with the people with whom Serio claimed to have done business at a time when the transactions were reasonably fresh in the minds of all concerned and their records still in existence and that the delay in the tender of the records for two and one-half years after the fire destroyed the ability of Petitioners to make that type of check of the records to which they were entitled and to which the contract gave them a right. The facts in the affidavit were not denied.

In the case of *World Fire & Marine Ins. Co.* v. *King*, Miss., 191 So. 665, the Court pointed out that the production of books and records in a reasonable time after the fire was vital to the insurer so that the insurer could inspect and examine the same and to enable the insurer "to trace the transactions reflected by the books so as to verify the truth of the matters contained therein * * * so that the transactions might be investigated."

The production of such books and records within a reasonable time after the fire is not excused merely by the fact that the records are lost. If the failure to comply with the contractual agreement to produce the records in a reasonable time after the fire was due to insured's own fault or negligence then the impossibility of producing them afforded him no excuse.

In *Liverpool, London, etc., Inc. Co.* v. *Kearney,* 180 U.S. 132, 45 L. Ed. 460, cited with approval in *Lewis* v. *National Fire,* Miss., 101 So. 296, there appears this language:

> "We are of opinion that the failure to produce the books and inventory, referred to in the policy, means the failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the fault, negligence or design of the insured."

Now the books and records were allegedly not produced because they were lost, rather than because they were destroyed by fire, but they were lost through the negligence and fault of the insured and his employees.

Not only were the records not produced within a reasonable time after the fire, thus causing a breach of a contractual agreement so as to require a directed verdict for Petitioners on a new trial on that ground, but also Respondent does not tender, by his affidavits, records and books which would necessarily cause a different result on a new trial. Even if we assume that most of the records found are originals, which is not alleged under oath by either Serio, Miss Lederer or the auditor, the previous inventory, not theretofore submitted but allegedly now found, is admittedly a "copy", not an original record. Necessary records not found were the Daily Production Sheets, the only records from which the value of canned goods on hand could be determined (R. 523-4, 329). The burden of proof of the sufficiency of the records kept and now submitted was upon Movant.

That any records lost through the negligence of an insured and not submitted to an insurer until two and one-half years after the fire are too late to constitute a compliance with the contractual provisions of the policy, a question of substantive law, is controlled by the decision

in *Standard Ins. Co.* v. *Anderson*, Miss., 86 So.2d 298, where the insured failed to furnish the insurer with oral information requested during an Examination Under Oath. The information was later tendered 13 months after the fire, but the Court held:

> "This offer came entirely too late. Any benefits, which could have been discovered from the examination on December 22, 1953, had long since perished and could not have been resurrected as a result of compliance with this belated offer."

This is not merely a case where a litigant failed to produce evidence that he needed to prove his case at a trial. This is a case where appellant failed to comply with a solemn contractual agreement to care for and preserve his records so that they would be available to the insurer within a reasonable time after the fire, before any trial was even thought of, so that the insurer could verify them, determine their validity and sufficiency, check and determine the amount of the loss if there was liability or make a decision as to whether all liability would be denied. There is involved more than mere negligence of a party to a law suit in failing to produce evidence for his own benefit, but on the other hand there is involved a breach of a contractual agreement providing that upon such breach the policy would be void. Moreover, Respondent cannot take the position that he failed to produce sufficient evidence to make a jury issue at the trial of the case but that he is entitled to a new trial merely because he can now produce evidence which *might be sufficient to take the case to the jury.* He must go further and prove that he can now produce evidence that practically conclusively shows that he has complied with his contract. This Respondent did not do.

3.

The Court of Appeals below has so far departed from the accepted and usual course of judicial proceedings, in a case involving an important matter of federal law and public policy, as to call for an exercise of this Court's power of supervision.

The Court of Appeals below is now committed to a doctrine of extreme liberality in granting relief under Rule 60(b)(2), and in granting such relief: where there has been no due diligence on the part of the Movant in discovering the new evidence; where the trial court has denied the motion in the exercise of its discretion, such decision being amply supported by the evidence; where the granting of the new trial would not change the result of the litigation upon a new trial because of a rule of substantive law of the state of trial.

In so doing the Court of Appeals below has decided an important question of federal procedural law in conflict with all other circuits and has decided in a Diversity case a question of substantive insurance law, of vital importance to all insurance companies, in conflict with the readily ascertainable State Law.

In so doing the Court of Appeals below has adopted a policy of protracting litigation contrary to public policy.

In the case of *Toledo Scale Co.* v. *Computing Scale Co.*, 67 L. Ed. 719, 261 U.S. 399, this Court in affirming the action of the trial judge in denying a motion for a new trial used the following language:

> "The apparent hardship of particular cases should not and cannot weigh against the application of this sound principle. As Mr. Justice Story remarked in Ocean Ins. Co. v. Fields, 2 Story 59, Fed. Cas. No.

10,406: *'It is for the public interest and policy to make an end to litigation;* or, as was pointedly said by a great jurist, that suits may not be immortal while men are mortal.'"

In Sec. 1323 of *Barron & Holtzoff's Federal Practice and Procedure* the test points out the policy of the other Courts of Appeal as follows:

> "'Laudable as is the goal of remedying injustice, Rule 60(b), requires the courts to strike a balance between that goal and the desire to achieve finality in litigation. The cases show that the courts have exercised discretion under that rule with a scrupulous regard for the aims of finality—they have prevented the needless protraction of litigation by requiring the moving party to show a good claim or defense."

Moreover, the strict enforcement of the contractual provisions in Iron Safe Clauses, in order that the insurance company may investigate the transactions, was held to be part of the public policy of the State of Mississippi in *World Fire & Marine Ins. Co.* v. *King*, Miss., 191 So. 665, where the Court stated:

> "The provisions contained in clause 3, above quoted, *are of the highest importance and are consistent with the public policy and general good of the people of the State.*"

Such liberality in the allowance of a new trial would permit fraudulent litigants to withhold evidence and speculate on the outcome of the trial without production of the same. It would make trials of cases mere experimental ventures. As was pointed out in *Rowlik* v. *Greenfield*, D.C. Pa., 87 F. Supp. 997:

> "* * * a reasonable regard should be had to the desirability of stability and finality of the trials of

causes once carefully had and completed. And new trials should not be allowed simply because after the verdict the losing party has *come upon some* witness or *information theretofore unknown to him or his attorney. Irrational indulgence in that respect would inevitably make of most trials merely experimental ventures.*" (Emphasis ours).

The rule of this Court that apparent hardship of particular cases should not weigh against the application of sound principles, is also applied by the State of Mississippi. In *Anderson v. American & Foreign Ins. Co.*, Miss., 86 So.2d 303, where the insured failed to furnish the insurer, when requested in a reasonable time after the fire, with oral information, but tendered the same approximately a year after the fire, and where the Court held that this constituted a violation of the contractual provision of the policy, the Court stated:

> "It is unfortunate, assuming the property that was destroyed by the fire was worth from $28,000 to $30,000 as testified to by the insured, that he should lose the right to collect the insurance sued for in these three cases, nevertheless the contractual provisions of the policies to the effect that the same should be null and void for a failure of the insured to comply with the provisions therein contained, cannot be disregarded."

In the area composing the Fifth Circuit practically all insurance cases are between citizens of different states. The majority of such cases involve the jurisdictional amount. Any procedural rights allowed insureds in a Federal Court in such cases superior to the rights in the applicable State Courts would materially enhance the number of cases tried in the Federal Courts contrary to the clear intent of Congress and the Courts. Any substantive rights allowed insureds in the Federal Courts superior to the rights of an insured in the applicable State Court is,

of course, in direct conflict with the holding of this Court in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 82 L. Ed. 1188.

Or as was said by this Court in *Fidelity Union Trust Co.* v. *Field*, 85 L. Ed. 109, 311 U.S. 169:

> "The question has practical aspects of great importance in the proper administration of justice in the federal courts. It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship."

CONCLUSION.

For the foregoing reasons, it is respectfully urged that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE.

The undersigned of counsel for petitioners certifies that a true and correct copy of the foregoing Petition for Writ of Certiorari has been served on the Hon. O. W. Phillips of Magnolia, Mississippi, and the Hon. P. Z. Jones, now being deceased, upon the Hon. M. B. Montgomery of the firm of Barnett, Jones & Montgomery of Jackson, Mississippi, attorneys of record for Respondent, by depositing the same in the United States Post Office or mail box with first class postage prepaid, properly addressed, in strict accordance with Rule 33 of the Revised Rules of the Supreme Court of the United States effective July 1, 1954.

This the 21 day of July, 1959.

Elizabeth Hulen Grayson

Elizabeth Hulen Grayson,
Of Counsel for Petitioners.